

Imagine you and a couple of civic-minded friends decide to start a blog. You form a limited liability corporation to protect your livelihood and you accept donations through an online “tip jar.” You take positions on controversial issues, call out elected representatives on bad behavior and educate the public on legislation, sometimes supporting and sometimes opposing it.

You were exactly who the founders had in mind when the Bill of Rights was added to the Constitution. You are taking advantage of your freedom to assemble and speak. You are the free press.

Today, you might fall under new legislation. The DISCLOSE (Democracy Is Strengthened by Casting Light on Spending in Elections) Act says that corporations must report expenditures to the Federal government and guarantee that less than 20% of your blog’s financial support comes from foreign nationals. So, either you get rid of the tip jar or you had better clarify the nationality of every donor. Maybe you’ll even decide running a blog isn’t worth filing paperwork with the FEC or risking a paralyzing lawsuit.

This is just one small example of how the DISCLOSE Act could limit or repress political speech in the United States.

Many Constitutional scholars expect this legislation, if it becomes law, to be overturned by the Supreme Court – but not until at least one election cycle has passed. Some have even called the bill the, “Democratic Incumbents Seeking to Contain Losses by Outlawing Speech in Elections,” because of the chilling effect it would have on participation in the upcoming congressional elections.

In 1787 three men wrote essays about the new United States Constitution under pseudonyms. They didn’t use their own names because their writings were considered dangerous – even treasonous – at the time. If they had blogged about legislation today the way they wrote about the Constitution in *The Federalist Papers*, it seems that some members of Congress would have tried to regulate their speech.

Now, let’s take a closer look at the effects of the DISCLOSE Act:

- First, since it fails to distinguish between election activity and issue advocacy, it will stop many smaller non-profit organizations and businesses from speaking publicly about legislation. Such comments could force the organization into the Act's complicated reporting requirements and many organizations will decide that speaking out isn't worth the risk.
- Second, it is unequal in application. Similarly situated corporations and unions are treated in dramatically different ways under the law. For example, corporations must file a certification with the Federal Election Commission in order to determine their eligibility to spend money on political speech. Unions are free to spend unlimited amounts of money without prior certification.
- Third, it fails to respect the federal system; not distinguishing between state and federal elections and potentially subjecting state candidates whose campaigns incorporate to a whole range of regulations and requirements that do not apply to un-incorporated campaigns.
- Fourth, it contains excessive mandates on political speech, requiring more than half of advertising time related to legislation or elections to be spent on disclaimers – but only if the advertisement is purchased by an organization, not candidates.

Supporters of this legislation say that it is about disclosing who funds advertising campaigns that could influence elections so that voters can be better informed. If that's the goal, then this legislation does a very poor job of it because we already have strong disclosure laws. But if the goal is to create mass confusion and repress speech before a mid-term election, then this legislation has a very strong chance of accomplishing that goal. This bill would go into effect thirty days after it passes, but we don't fully know how it affects speech on the Internet. The Federal Election Commission would not have time to promulgate regulations related to the legislation before it goes into effect – leaving organizations and campaigns at risk for criminal prosecution based on a law they don't understand.

Yet, with all these obvious flaws, the House of Representatives has voted to pass the DISCLOSE Act. I, along with 205 of my colleagues, opposed it. James Madison, who wrote that the, "right of freely examining public characters and measures, and of communication...is the only effectual guardian of every other right" would have opposed it too.

The DISCLOSE Act has a cautionary message for Americans: when powerful Washington insiders try to control what other people can say publicly about their voting records, watch out – your liberty is at risk.

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